



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Telos Field Engineering

File: B-233285

Date: March 6, 1989

DIGEST

1. The fact that protest is first filed with General Services Administration Board of Contract Appeals and dismissed without prejudice for lack of jurisdiction does not preclude subsequent filing at General Accounting Office within 10 days of when protester originally learned its basis for protest.

2. Protest that awardee's proposal did not meet solicitation requirement that contractor personnel possess top secret security clearance is denied since clearance is a contract performance requirement and the agency reasonably was satisfied that the awardee would meet the requirement.

DECISION

Telos Field Engineering protests the award of a contract under request for proposals (RFP) No. F25606-88-R-0034 issued by the 3908th Contracting Squadron, Offutt Air Force Base, Nebraska. Telos contends that the Air Force improperly evaluated the proposal of the awardee, Storage Technology Corporation (StorageTek), or improperly determined it to be responsible, because it allegedly did not offer to meet, nor could it meet, certain requirements of the RFP.

We deny the protest.

This solicitation was for the maintenance of an International Business Machines (IBM) 3081 computer and its peripheral equipment for a base year (October 1, 1988, through September 30, 1989) and 4 option years. The RFP contemplated the award of a firm, fixed-price contract to the lowest-priced offeror whose technical proposal met the

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government's minimum requirements. Those requirements were set forth in Section C of the RFP, the Statement of Work (SOW).

Of relevance to this protest, Section 3 of the SOW, "Responsibilities of the Contractor," provided that the contractor would be responsible for scheduled maintenance, 0700 to 1600 hours, Monday through Friday, with a maximum response time of 2 hours after notification. The contractor was also responsible for on-call, remedial maintenance 24 hours a day, 7 days a week and was required to arrive and begin repairs within 2 hours. Under Section 9, "Security," the SOW stated in part that "All contractor personnel shall have a TOP SECRET clearance based upon a special background investigation [SBI], prior to performance of this contract."

The RFP did not require the submission of particularly complex proposals. According to the RFP's proposal preparation instructions, among other submissions, each proposal was to contain "a resume for each prospective technician to include a statement that the individual either has the required security clearance, or will obtain the required security clearance by the contract start date."

On the closing date of September 9, 1988, proposals were received only from the protester, who was the incumbent maintenance contractor, and StorageTek. In its initial proposal, StorageTek stated that it was qualified to maintain, support, and service IBM products and agreed to the 2-hour response time requirements of the SOW. It furnished resumes of the personnel who would perform the contract and agreed to provide the appropriate security clearance. Although it did not identify those personnel who currently had the required security clearance, it agreed to furnish that data upon contract award or earlier if required.

During discussions with StorageTek on September 16, the agency stated, among other matters, that it was not certain StorageTek understood the security requirements. The Air Force requested that StorageTek forward, as soon as possible, the needed security documents (top secret clearance with SBI access).

In its September 23 best and final offer (BAFO) StorageTek listed the names of employees in its Omaha office who had once held security clearances within the government. It also stated that these employees would be reapplying for a top secret, SBI clearance upon award. Four of the five employees listed had held top secret clearances and the fifth had held a secret clearance.

StorageTek's price was the lowest and on September 29, the contracting officer determined the firm to be responsible based on general criteria of responsibility, i.e., that the firm had the financial capability, qualified personnel, and equipment necessary to perform the contract, and a satisfactory record of past performance.

According to the contracting officer, on October 5, prior to contract award, he requested of StorageTek by telephone information on personnel with proper clearance who could maintain the computer equipment until final clearances were obtained for the proposed Omaha office employees. StorageTek provided the name of one individual. The contracting officer also ascertained from the base's computer project officer that contractor employees could be escorted until security access authority was granted.

Later on October 5, the contract administrator called StorageTek to notify it of the award. He also requested security information on the personnel who would be sent so that he could arrange for base access. When, on the same day, Telos was notified of the award, it alleged that StorageTek had no personnel in the area who had the required clearance, who were qualified to maintain the equipment, or who could meet the 2-hour response time requirement. Telos indicated it would protest the award.

After consultation, the contracting officer and the contract administrator called StorageTek to request the name of the cleared person, so that clearance could be verified. They also asked whether the person was qualified and whether StorageTek could in fact meet the 2-hour response requirement. The StorageTek representative stated that the company had properly cleared personnel working with the Pentagon and the National Aeronautics and Space Administration.

By telecopy on October 6, StorageTek furnished the name of one technician, her resume, and a statement of her qualification to repair IBM equipment. By letter of October 6, received October 12, StorageTek furnished the same information plus the name and resume of an additional, cleared technician. On the basis of this information, the agency did not terminate the contract.

Telos filed a protest of the award with the General Services Administration Board of Contract Appeals (GSBCA). However, after a telephonic conference on October 18, the GSBCA learned that the procurement was exempt from the Brooks Act

pursuant to 40 U.S.C. § 759(a)(3)(C)(iii), (v) (Supp. IV 1986) and thus dismissed the Telos protest without prejudice, for lack of jurisdiction. See 40 U.S.C. § 759(f) (Supp. IV 1986). On October 20, Telos filed its protest with our Office. Since Telos' protest was not filed within 10 calendar days of award, performance of the contract was not suspended. See Federal Acquisition Regulation (FAR) § 33.104(c)(5) (FAC 84-32).

As a preliminary matter, the Air Force argues that the protest should be dismissed because Telos' initial choice of the GSBICA precludes it from filing a protest with our Office.^{1/} As support, the Air Force relies upon certain provisions of the Competition in Contracting Act of 1984 (CICA) and urges us to reverse, as erroneous, our decision in Idaho Norland Corp., B-230598, June 6, 1988, 88-1 CPD ¶ 529, which is contrary to its position.

Under CICA, an interested party who has filed a protest with the GSBICA "may not file a protest with respect to that procurement" at the General Accounting Office (GAO) 31 U.S.C. § 3552 (Supp. IV 1986). Similarly, 40 U.S.C. § 759(f) (Supp. IV 1986) provides that an interested party who files a protest with our office "may not file a protest with respect to that procurement" at the GSBICA. Our Bid Protest Regulations repeat the statement in 40 U.S.C. § 759(f), but also provide that "[a]fter a particular procurement . . . is protested to the [GSBICA], the procurement may not, while the protest is before the [GSBICA], be the subject of a protest to the [GAO]." (Emphasis added.) 4 C.F.R. § 21.3(6) (1988). None of these authorities prohibits our consideration of Telos' protest in view of the specific circumstances presented here.

Telos erroneously filed its protest with the GSBICA and, when it was dismissed without prejudice, expeditiously filed its protest with our Office within the first 10 working days after it knew of its protest basis. Under similar circumstances we concluded that we could consider the protest in Idaho Norland Corp., B-230598, supra, 88-1 CPD ¶ 529 at 2, note 1, and we are not persuaded that our conclusion was incorrect. It is plain that the applicable statutes and our Regulation were designed to prevent protesters from

^{1/} The Air Force also contended that Telos' protest was untimely because it believed the protest was not filed until October 21, 11 working days after the basis of protest was known. This contention is without merit since the record clearly reflects that the protest was filed on October 20, the tenth work day.

maintaining duplicate actions in separate forums. However, they do not stand for the proposition that by filing first in one forum, a protester, such as Telos in this case, has made a final election which it may not subsequently change by timely filing in the other forum.

The facts of this case are distinguishable from others in which we have discussed the concept of a final election. In System Automation Corp., B-224166, Oct. 29, 1986, 86-2 CPD ¶ 493, the protester first filed with our Office more than a year after learning its protest basis. The protester had earlier filed with the GSBICA and had its protest sustained only to have the decision reversed when the Court of Appeals for the Federal Circuit held that the GSBICA lacked jurisdiction to decide the matter. In dismissing the protest as untimely, we reasoned that CICA contemplated that a protester would make a final election between the GSBICA and our Office when both forums are available, and that it would be inconsistent to permit a protester to use an initial filing with the GSBICA as a means of preserving its right to be heard at our Office when it later protests in an untimely manner. The protester in TAB, Inc., 66 Comp. Gen. 113 (1986), 86-2 CPD ¶ 639, sought to avoid the outcome of System Automation, by timely filing both with the GSBICA and with our Office in the event the GSBICA determined it had no jurisdiction. We dismissed the protest, noting the intent of CICA that a protester make an election (Resource Consultants Inc., 65 Comp. Gen. 72 (1985), 85-2 CPD ¶ 580) and the impropriety of our considering a matter actively being litigated before the GSBICA (Analytics Communication System, B-222402, Apr. 10, 1986, 86-2 CPD ¶ 356). Telos is not maintaining dual actions in separate forums as in TAB, nor is it untimely as in System Automation. Thus, we perceive no reason why we should not consider Telos' protest on the merits.

The essence of Telos' protest is that the award to StorageTek was improper because that firm had failed to demonstrate, prior to award, that it had available in the Omaha area security-cleared personnel capable of maintaining an IBM 3081 system on a 2-hour response basis. The protester approaches this contention from two different theoretical standpoints: as a failure of the contracting officer to properly evaluate StorageTek's proposal and as a failure to apply definitive responsibility criteria in the RFP.

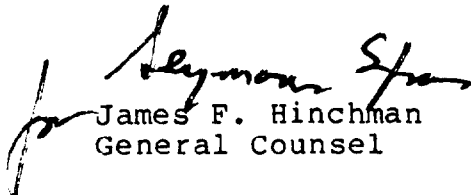
As for the latter, we point out that requirements in a solicitation's SOW, such as those identified by Telos, concern the contractor's performance obligations, and not

its ability to perform, and thus are not definitive criteria of responsibility. See Cumberland Sound Pilots Association--Request for Reconsideration, B-229642.2, June 14, 1988, 88-1 CPD ¶ 567. The ability to meet specification requirements is encompassed by a contracting officer's subjective responsibility determination, to which we will object only upon a showing of bad faith, which has not been made here. Telos Field Engineering, B-233250, Nov. 8, 1988, 88-2 CPD ¶ 462 (protest of award of contract for computer maintenance services on basis that awardee did not offer properly trained and experienced personnel as required by RFP's SOW dismissed because it did not concern definitive responsibility criteria).

As for the evaluation of proposals with respect to those SOW requirements concerning the offeror's qualifications to maintain the computer equipment and obligation to respond within 2 hours after notice of a maintenance need, our review of the record does not reveal any basis for questioning the Air Force determination that StorageTek's proposal was acceptable. In fact, both of the offerors here not only committed themselves to fulfill requirements such as the 2-hour response time, but presented themselves as experienced, well-established providers of maintenance service for IBM equipment on a national basis including classified locations. Likewise, we find that the Air Force reasonably determined that StorageTek could meet the security clearance requirement.

Although StorageTek's proposed employees did not possess updated top secret clearances, StorageTek had promised to obtain the required clearances upon contract award. Further, prior to award, the contracting officer had ascertained that StorageTek had properly cleared personnel to perform the contract until the proposed staff obtained their clearances. StorageTek furnished the name of one such employee prior to award and supplied two names shortly after award. In view of the proposal's specific authorization for substitution of personnel, we find nothing objectionable in the Air Force's acceptance of StorageTek's plan to use temporary personnel pending final clearances for the proposed staff.

Accordingly, the protest is denied.


James F. Hinchman
General Counsel